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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 JIN WU and CHANG ZHANG,

13 Plaintiffs,

14 v.

15 ALBERTO GONZALES, Attorney General
16 of the United States; MICHAEL CHERTOFF,
17 Secretary of the Department of Homeland
18 Security; EMILIO T. GONZALEZ, Director
of United States Citizenship and Immigration
Services,

19 Defendants.

) No. C 07-3118-PVT

) **DEFENDANTS' OPPOSITION TO**
) **PLAINTIFFS' CROSS-MOTION FOR**
) **SUMMARY JUDGMENT**

) Date: February 12, 2008

) Time: 10:00 a.m.

20 The defendants hereby oppose plaintiffs' motion for summary judgment for the reasons set
21 forth in defendants' motion for summary judgment. In addition, the defendants wish to address
22 two of plaintiffs' arguments in more detail.

23 A. 8 U.S.C. § 1571

24 The defendants contend that plaintiffs' reliance on 8 U.S.C. § 1571 is misplaced. That statute
25 provides, in relevant part, that "[i]t is the sense of Congress that the processing of an immigration
26 benefit application should be completed not later than 180 days after the initial filing of the
27 application." As an initial matter, the defendants wish to point out that this statute was enacted
28 prior to September 11, 2001, and after USCIS's enhanced effort to conduct more thorough

1 rigorous (and consequently more time-consuming) background checks on aliens who seek
 2 immigration benefits. *See* Declaration of Gerald Heinauer ¶ 13; Pub. L. 106-313, Title II, § 202,
 3 Oct. 17, 2000), 114 Stat. 1262. Accordingly, 8 U.S.C. § 1571 no longer provides a meaningful
 4 standard against which the Court can measure the delay at issue in this case. The events of
 5 September 11, 2001 marked a dramatic shift in issues involving national security. It is well
 6 established in the Declaration of Michael Cannon that since September 11, 2001, the FBI's
 7 resources have been sorely taxed by the demands that have been made on it by USCIS and other
 8 agencies. Legitimate national security concerns, intensified by the sophistication of some of the
 9 threats to the lives of people in this country, have forced federal agencies to be considerably more
 10 careful and thorough in their investigations than they were in the past. In short, after the
 11 enactment of 8 U.S.C. § 1571, there has been a lot more work for the FBI and USCIS to do.

12 Secondly, the language of 8 U.S.C. § 1571 clearly demonstrates that it is merely precatory. As
 13 precatory language, this provision does not give plaintiffs a right to an adjudication of their I-485
 14 applications within any particular time frame. *See Wright v. City of Roanoke*, 479 U.S. 418, 432
 15 (1987) (stating that a statute phrased in precatory terms does not create a substantive right); *Orkin*
 16 *v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007) (9th Cir. 2007) ("Sense of Congress' provisions are
 17 precatory provisions, which do not in themselves create individual rights, or, for that matter, any
 18 enforceable law.").

19 B. National Security

20 In their cross-motion for summary judgment, the plaintiffs suggest that defendants have failed
 21 to provide an individualized showing that they pose a risk to national security. Plaintiffs' Motion
 22 for Summary Judgment at 8. As the declaration of Michael Cannon makes clear, however, name
 23 checks are generally performed on a first-in, first-served basis, subject to numerous factors that
 24 contribute to delays in the completion of an individual's name check. Declaration of Michael
 25 Cannon ¶¶ 20, 26-30. Plaintiff Zhang's name check has been completed, and plaintiff Wu's name
 26 check is being processed in accordance with the procedures set forth in Michael Cannon's
 27 declaration. Cannon Declaration ¶ 41. The defendants do not have a burden of demonstrating at
 28 this point that plaintiffs pose a risk to national security. It is the completion of the name check,

1 performed in accordance with standard procedures, that will allow the agencies to determine
2 whether an individual is a risk to national security.

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6 Dated: January 22, 2008

Respectfully submitted,

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9 /s/
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